

File



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Richard Zenger, *et al.*, for a Permit
to Remove Materials from the Bed of Lauderdale
Lakes, Town of La Grange, Walworth County,
Wisconsin

Case No.: 3-SE-98-0282

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Richard Zenger *et al.* filed an application with the Department of Natural Resources on May 19, 1998, under sec. 30.20, Stats., for a permit to remove materials from the bed of Lauderdale Lakes. On September 3, 1998, the Department of Natural Resources denied the application and determined that the project would be detrimental to the public interest in Lauderdale Lakes.

The Department received a request dated October 23, 1998 for hearing pursuant to sec. 227.42, Stats., from Mr. Zenger. On May 3, 1999, the Department of Natural Resources filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was conducted on June 3, 1999, in Lake Geneva. Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with secs. 227.47 and 227.53(1), Stats., the parties to this proceeding are certified as follows:

Applicants

Richard Zenger
N7673 Rendell
Elkhorn, WI 53121

and

Erwin G. Szela, Jr.
W5187 Stewart
Elkhorn, WI 53121

Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, WI 53707

FINDINGS OF FACT

1. Richard and Linda Zenger (Zengers), Mark Neuman (Neuman) and Erin and Michelle Szela (Szelas) owned property adjacent to Mill Lake in Walworth County. The Zenger, Neuman and Szela properties are located along the east side of Mill Lake. The Zengers, Neuman and Szelas are riparians on Mill Lake. Mill Lake is navigable in fact at the project site.

2. By application dated April 30, 1998, the Zengers, Neuman and the Szelas applied to the Department of Natural Resources (Department) for a permit¹ to dredge material from the bed of Mill Lake adjacent to their respective properties. The applicants propose to dredge approximately 900 cubic yards of material from the bed of Mill Lake. The Department and the applicants have fulfilled all procedural requirements of secs. 30.20, 30.12 and 30.02, Stats.

3. In a supplement to the application the proposed project was described in more details as follows:

The applicants intend to dredge a shoreline area of Lauderdale Lakes. The project will be done mechanically from shore, extending out approximately 50 feet. Equipment will access the shoreline from the south side of Zengers and from between Neuman and Szela properties. The sediment will be deposited in trucks and taken to an upland disposal site. Disposal site has yet to be finalized, however, the site being discussed is on Highway H and was used recently for another dredging project on Lauderdale Lakes.

Only the soft sediment will be removed. No underlying hard pan material will be removed. No depressional areas that would function as fish traps, will be created.

Approximately 900 cubic yards and an average of three feet of soft sediment will be removed – 215 ft shoreline x 40 out x 3 deep (this equals 955 cubic yards, however, the Zenger property boundary extends at an angle which reduces the yardage). The immediate 10 feet along the shore is firm hard pan and will not be removed. The soft material will be removed from the area 10 feet to 50 foot out from shore, to restore the original lake bottom. The dredging area will be isolated from the rest of the bay by the use of barrier curtain. This will contain the suspended sediment within the project area.

¹ Pursuant to sec. 30.20(1)(a), Stats., the Department issues contracts, not permits, to persons seeking to remove material from the bed of a navigable lake. However, because both parties have used the term "permit" throughout the processing of the subject application, to avoid confusion I will continue to refer to the authorization sought as a "permit" in the Caption, introduction, and Findings of Fact of this decision. In the Conclusions of Law and Order, I have used the legally correct term "contract."

The curtain will remain in place until the project is complete and the suspended material resettled.

Landowners also request that the permit include rock riprap along the shorelines following completion of the dredging project. Applicants also request that a four inch thick pea gravel blanket be installed in the project area following the dredging.

At the hearing, Mr. Zenger amended the application to include a permit to repair a concrete sea wall in front of his property. Since the application was filed, Mr. Neuman sold his property, Mr. Zenger and Mr. Szela requested that any permit also apply to the new owner of the Neuman property. It was explained to the applicants that without the new owners participation in the hearing, no permit would be issued with respect to this property. The new owner will be required to file a separate application. However, any analysis with respect to the instant application would presumably be applicable to the former Neuman property.

4. The Zenger and Szela properties are located on a small bay along the east side of Mill Lake on the stretch of water which connects Mill Lake to Middle Lake. The legal description of the proposed project site is in Township 4 North, Range 16 East, Town of La Grange, Walworth County, Wisconsin. The Zengers purchased their property in 1995. The Szelas purchased their property in 1998.

5. The lakebed adjacent to the Zenger and Szela properties is primarily muck underlain with a clay/sand/gravel mixture. Vegetation in the bay is dominated by Eurasian water milfoil. Also present is wild celery, chara, water stargrass and various pond weed species.

6. Organic matter tends to accumulate in this bay because of its location on the east side of the lake. As the organic matter settles to the bed of the lake and decomposes, the depth of the muck on the lakebed increases. The muck limits the recreational activities, primarily swimming and wading, which are available in front of the Zenger and Szela properties. Not only does the presence of the muck make swimming and wading unpleasant, it also threatens the safety of small children who have become stuck in the muck.

7. The applicants wish to remove the muck to improve the recreational activities adjacent to their properties. The applicants concede that organic matter will continue to accumulate in the bay and as it settles and decomposes the muck will begin to cover the pea gravel blanket. However, the applicants believe if they diligently rake the weeds from the bay as they accumulate, they can prolong the time period until the lakebed will need to be dredged again.

8. The aquatic vegetation at the site provides spawning habitat for northern pike, yellow perch, golden shiners, and grass pickerel. This same vegetation provides nursery/feeding habitat for the above mentioned species as well as for largemouth bass, bluegill, pumpkinseed, and black crappie.

9. Dredging will eliminate the aquatic vegetation and associated aquatic invertebrates which makes this area productive spawning and nursery/feeding habitat. The

number and variety of fish in the this bay will be reduced. Dredging will degrade the bay and improve habitat for undesirable fish such as carp.

10. Over time aquatic vegetation will become reestablished in the dredged areas. However, the pea gravel blanket will prevent the reestablishment of aquatic vegetation in the area that the pea gravel blanket is placed. A presumed purpose of the proposed project is to permanently rid the dredged area of aquatic vegetation. Although the pea gravel blanket will create a firm lake bed which will be more conducive for swimming and wading, it will be detrimental to use of the area as fish spawning and nursery habitat.

11. The applicants argued that the area proposed to be dredged is only a small part of the bay. Although the Department's witnesses testified that the area proposed to be dredged is valuable as a spawning and nursery habitat for several species of fish, they did not testify that this habitat is unique or rare on Mill Lake. The impacts of the proposed project in the instant matter, like many projects, are relatively minor and difficult to quantify. However, pursuant to the holding in Hixon v. PSC, 32 Wis. 2d 608, 146 N.W.2d 577 (1966), the Department is required to consider the cumulative impacts resulting from such projects. The adverse impacts on fish habitat of this project must be considered along with the adverse impacts of other potential projects on Mill Lake. The adverse impacts on fish habitat when added to the adverse impacts resulting from other similar impacts in Mill Lake will be detrimental to the public interest and rights in Mill Lake.

12. The applicants did not present any evidence at the hearing in support of their application for permits to place riprap along the shoreline and for Zengers to reconstruct the concrete seawall adjacent to their property. The Department did not present evidence of any negative impacts that would result from the placement of riprap or reconstruction of the concrete seawall; however, one of the Department's witnesses did testify that the use of riprap at the proposed site would be inappropriate because no erosion was occurring along this shoreline from either wave action or ice heave.

It is not clear whether the applicants intended to pursue an application for a permit to place riprap or reconstruct the seawall independent of the dredging project. However, in the event that they wish to do so, this application is also denied. The applicants' have the burden to prove that the placement of riprap and reconstruction of the seawall on the bed of Mill Lake will not be detrimental to the public interest. The applicants did not satisfy this burden of proof.

13. The proposed project will not adversely affect water quality nor will it increase water pollution in Mill Lake. The project will not cause environmental pollution as defined in sec 299.01(4), Stats.

14. The Department of Natural Resources has complied with the procedural requirements of sec 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

The applicants have applied for a permit to dredge the muck from a portion of the lakebed in front of their properties and to place a pea gravel blanket on the bed of Mill Lake. One can empathize with the applicants' desire to make the lakebed in front of their properties more conducive to recreation and safer for small children. However, the applicants were aware, or should have been aware, of the condition of this lakebed when they purchased their respective properties.

The evidence at the hearing is that the muck is the result of organic matter which is blown into this bay and settles on the lakebed. The applicants testified that they believed the proposed dredging project will give them relief for several years. The flip side of this is that the applicants or the successor owners of these properties will likely be back in a few years requesting another permit to remove the new muck which will accumulate. This repeated dredging will again destroy fish spawning and nursery habitat. The applicants testified that they have and will continue to diligently rake accumulated weeds from the lake in front of their property. This raking should substantially slow the accumulation of muck on the lakebed and will probably delay the time when dredging will again be needed. However, the applicants' own testimony is that inevitably the muck will again accumulate. Undoubtedly then they will be seeking another dredging permit.

Although it is unfortunate that the applicants can not enjoy the lake in front of their property to the extent they would like, the bottom line is that it is not in the public interest to allow destruction of spawning and nursery habitat to temporarily improve the recreational use of this area. The applicants have the burden to prove that the proposed project will be consistent with public rights and will not be detrimental to the public interest in Mill Lake. The applicants did not satisfy this burden. At the hearing, the Department did not show substantial negative impacts resulting from the proposed project. However, as the State Supreme Court discussed in Hixon, the Department must consider the impact of multiple projects which individually may not be substantial. In Hixon, the Wisconsin Supreme Court said:

There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever.

32 Wis 2d 608, at 631 (1966).

CONCLUSIONS OF LAW

1. Richard and Linda Zenger and Erwin and Michelle Szela are owners of land riparian to Mill Lake. Mill Lake is a navigable body of water.

2. Pursuant to sec. 30.20(2), Stats., a contract to remove material from the bed of a lake may be issued whenever the proposed dredging is consistent with public rights. The applicant has the burden of proof to show that the proposed dredging is consistent with public rights. As set forth in the findings of fact, the applicants have not satisfied this burden.

3. The proposed dredging is a type IV action pursuant to sec. NR 150.03(5)(8)(f)1.e., Wis. Adm. Code. Pursuant to sec. NR 150.01(b), Wis. Adm. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.

4. Pursuant to sec. 30.12(3)(b), Stats., a permit to place a pea gravel blanket on the bed of a navigable body of water may be issued if the proposed deposition is not detrimental to the public interest. The applicant has the burden of proof to show that the proposed deposition is not detrimental to the public interest. As set forth in the findings of fact, the applicants have not satisfied this burden.

5. The proposed placement of a pea gravel blanket is a type IV action pursuant to sec. NR 150.03(5)(8)(f)4.b., Wis. Adm. Code. Pursuant to sec. NR 150.01(b), Wis. Adm. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.

6. Pursuant to sec. 30.12 (2), Stats., a permit to place riprap and reconstruct a concrete seawall on the bed of a navigable body of water may be issued whenever the proposed placement is not detrimental to the public interest. The applicant has the burden of proof to show that the proposed dredging is consistent with public rights. As set forth in the findings of fact, the applicants have not satisfied this burden.

7. The proposed placement of riprap and reconstruction of a concrete seawall on the bed of a navigable body of water is a type IV action pursuant to sec. NR 150.03(5)(8)(f)4.b., Wis. Adm. Code. Pursuant to sec. NR 150.01(b), Wis. Adm. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.

8. The Division of Hearings and Appeals has authority to issue the following order.

ORDER

IT IS THEREFORE ORDERED that the application of Richard Zenger *et al*, for a contract to remove material from the bed of Mill Lake pursuant to sec. 30.20, Stats., and for a permit to place riprap and reconstruct a concrete sea wall on the bed of Mill Lake pursuant to sec. 30.12, Stats. is hereby denied.

Dated at Madison, Wisconsin on July 13, 1999.

STATE OF WISCONSIN
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By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.